

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA ANN PONTE,

Plaintiff-Appellee/Cross-Appellant,

v

ROBERT FRANCIS PONTE,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

July 24, 2008

No. 274667

Washtenaw Circuit Court

LC No. 04-002966-DM

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right, and plaintiff cross appeals, the judgment of divorce. Because the trial court's decisions to invade defendant's separate assets and to deny plaintiff's requests for spousal support and attorney fees were fair and equitable, we affirm those portions of the judgment of divorce. However, because the trial court reached an inequitable result when it assigned the parties' entire prejudgment debt to defendant, we vacate that portion of the judgment of divorce and remand for an amended judgment assigning 50 percent of the debt, minus the credit card debt relating to defendant's payment of attorney fees, to plaintiff.

Defendant argues that the trial court's property division is inequitable because the court awarded plaintiff half of certain marital assets while assigning all marital debt incurred before the date of the judgment to him. Defendant also argues that the trial court erroneously invaded his separate assets, to the extent of a full equal division of those assets, for the purpose of supporting plaintiff.

We review a trial court's factual findings in a divorce action for clear error. *Berger v Berger*, 277 Mich App 700, 717; 747 NW2d 336 (2008). If the factual findings are upheld, we must decide whether the trial court's dispositional ruling is fair and equitable in light of those facts. *Id.* "This Court will affirm the lower court's discretionary ruling unless it is left with the firm conviction that the division was inequitable." *Id.* at 717-718.

The goal in distributing marital assets is to reach an equitable distribution in light of all of the circumstances. *Id.* at 716-717. The first step in dividing property is to determine marital assets and separate assets. *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997). Invasion of a party's separate estate is generally not allowed, but an estate can be opened for redistribution if one of two statutory exceptions exists. *Id.* at 494. MCL 552.23(1) permits

invasion of the separate estate if, after dividing the marital assets, one party demonstrates additional need. *Id.* Additionally, under MCL 552.401, if a party significantly assists in the acquisition or growth of the other party's separate asset, the court may consider the contribution as having a distinct value deserving of compensation. *Id.* at 494-495.

There was no dispute regarding the identity of the material marital assets that were to be divided by the trial court. Those assets consisted of a cottage located on leased land, the marital home located in Chelsea, and retirement accounts. We further find no dispute with respect to the identity of defendant's separate assets, namely, the property on West Middle Street in Chelsea that defendant used for his law office (valued at \$220,000), and the Pittsfield Township rental property that was valued at \$190,000, with an adjacent vacant lot valued at \$45,000. The total value of \$455,000 assigned to these assets formed a substantial part of the approximate \$753,000 value for all of the real estate interests that the trial court determined should be sold, with the sale proceeds divided equally between the parties. While the trial court did not assign a specific value to the retirement accounts, exhibit evidence at trial indicated that the account balances totaled approximately \$192,715.

We reject defendant's argument that the trial court erred by invading his separate assets. The trial court relied on the additional-need standard in MCL 552.23(1), and defendant has not demonstrated any basis for disturbing the trial court's decision. The trial court did not clearly err in finding that plaintiff's age, poor health, limited education, and limited work experience were obstacles to her obtaining employment. Further, defendant has not shown anything about plaintiff's failure to qualify for Social Security disability benefits or about her health circumstances that renders the trial court's invasion of premarital assets inequitable.¹ Therefore, we affirm the trial court's decision to invade defendant's separate estate, to the extent of an equal division, for the purpose of meeting plaintiff's needs.²

However, we agree with defendant that the trial court reached an inequitable result by requiring defendant to pay the parties' entire prejudgment debt. The outstanding debts consisted primarily of credit card debt, which, by the end of trial, exceeded \$150,000. While an equitable

¹ To the extent that defendant argues plaintiff's failure to qualify for disability benefits is plaintiff's fault either because she received wages "under the table" for ten years or because she refused to file amended joint tax returns, defendant has not provided any factual or legal support for the claims. Also, to the extent that defendant argues the trial court erred by evaluating plaintiff's financial need based on a life expectancy of at least 62 years, we find no clear error. Although plaintiff's treating physician, Dr. William Bria, opined that plaintiff's life expectancy could be as short as seven years, the trial court was not precluded from considering a longer life expectancy. Dr. Bria's opinion was qualified by an assumption that plaintiff would continue to smoke, and he failed to provide a "high end" or range of plaintiff's life expectancy. Dr. Bria also failed to detail the literature underlying his opinion. Every stage of an expert's analysis must meet standards of reliability. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004).

² Because we affirm the trial court's decision to invade defendant's separate estate under MCL 552.23(1), we need not address whether invasion was proper under MCL 552.401.

distribution of property is not necessarily an equal distribution, any significant departure from congruence must be clearly explained by the trial court. *Gates v Gates*, 256 Mich App 420, 423; 664 NW2d 231 (2003). Here, nothing in the trial court's factual findings justifies the trial court's decision to assign the parties' entire prejudgment debt to defendant, while awarding plaintiff 50 percent of the marital assets and 50 percent of defendant's separate assets. Although the trial court found that plaintiff's health, along with her age, limited education, and limited work experience, would make it difficult for her to obtain employment, it also found that defendant, based on his undiversified law practice, had a limited cash flow and had maintained the parties' lifestyle only through a successful manipulation of credit cards. In addition, the trial court found that defendant's conduct toward plaintiff was "not the kind of behavior" it considered fault to affect the property division. Under these circumstances, the trial court's assignment of the parties' prejudgment debt to defendant was inequitable, and we vacate the portion of the judgment of divorce assigning the entire debt to defendant. On remand, the trial court shall determine the amount of credit card debt, existing at the date of judgment, that resulted from defendant's payment of his attorney fees and the payment of plaintiff's attorney fees, which he was ordered to pay by the trial court, and assign that debt to defendant. Then, after subtracting this amount from the total amount of the parties' prejudgment debt, the trial court shall assign each party 50 percent of the debt.

On cross appeal, plaintiff argues that the trial court erred by denying her request for spousal support. Plaintiff argues that, at a minimum, the trial court should have left open the issue of spousal support for future consideration.

We review a trial court's decision regarding spousal support under the same standards applicable to the property division. *Berger, supra* at 727. The award is within the trial court's discretion. *Id.* at 726. "The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case." *Id.* Factors that a trial court should consider include:

(1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).]

In this case, the trial court considered appropriate factors in its decision. It invaded defendant's separate estate to satisfy plaintiff's needs, but it also considered the health and earning potential of both parties and the undisputed fact that the parties were living through defendant's successful manipulation of credit cards. The trial court recognized that if plaintiff is truly unable to secure employment, defendant is her only source of support, but found that "[i]t also seems fair to [defendant] that the Court not impoverish him, nor endanger and perhaps ruin his good credit rating by expecting him to support [plaintiff] on a long-term basis from his limited cash flow."

This case is unlike *Hanaway v Hanaway*, 208 Mich App 278, 296; 527 NW2d 792 (1995), in which this Court found that the plaintiff presented a strong case for spousal support and that she should not be expected to consume her capital to support herself. This Court indicated that, where both parties are awarded substantial assets, the trial court should focus on the income-earning potential of the assets and should not evaluate a party's ability to provide self-support by including in the amount available for support a value assigned to the assets themselves. *Id.* In this case, the trial court ordered a sale of the assets, thus providing for their conversion to cash on which plaintiff could live and invest. Under the circumstances, it was not inequitable to require plaintiff to consume or invest the liquid assets for support, especially when there is evidence that the parties were living through defendant's manipulation of credit cards and that defendant's law practice was suffering financially because it was not diversified.

Further, we cannot say with firm conviction that the trial court's denial of spousal support was inequitable. *Berger, supra* at 727. In essence, the trial court, by invading defendant's premarital assets, awarded spousal support in gross. "Alimony in gross is not really alimony intended for the maintenance of a spouse, but rather is in the nature of a division of property." *Staple v Staple*, 241 Mich App 562, 566; 616 NW2d 219 (2000). It is not subject to modification. *Id.* In addition, the trial court ordered defendant to pay plaintiff \$800 a month until the parties' real estate sold. Under these circumstances, we find no basis for disturbing the trial court's decision to bar spousal support.

Plaintiff also argues that, based on need and defendant's conduct, she is entitled to have defendant pay her trial and appellate attorney fees.

MCL 552.13(1) provides that a trial court "may require either party . . . to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency." MCR 3.206(C) provides:

(1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that

(a) the party is unable to bear the expense of the action, and that the other party is able to pay, or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

A trial court may also award attorney fees that a party has been forced to incur because of the other party's unreasonable conduct. *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). The other party's misconduct or violation of a court order must cause the inurrence of the attorney fees. *Reed v Reed*, 265 Mich App 131, 165; 693 NW2d 825 (2005).

In reviewing a trial court's decision whether to award attorney fees, the court's factual findings are reviewed for clear error and any questions of law are reviewed de novo. *Id.* at 164. The trial court's ultimate decision to grant or deny attorney fees is reviewed for an abuse of discretion. *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007). In general, "[a]n abuse of discretion occurs when the trial court's decision falls outside of the range of reasonable and principled outcomes." *Smith v Smith*, 278 Mich App 198, 207; 748 NW2d 258 (2008).

In this case, the trial court ordered that plaintiff was responsible for attorney fees that were not previously paid by defendant. Although plaintiff asserts that she submitted bills totaling \$37,900.89, the February 3, 2006 statement of account offered into evidence by plaintiff at trial showed an outstanding balance of \$16,400.89. Included in this amount was a December 2, 2005 balance of \$2,857.71, which defendant was ordered to pay at trial.

Plaintiff has not established that any misconduct by defendant caused her to incur any of her unpaid attorney fees. Further, plaintiff has not established that the trial court committed clear error in finding that defendant had a limited cash flow based on an undiversified law practice or that the parties lived off defendant's successful manipulation of credit cards. Under these circumstances, and given the fact that the trial court had previously ordered defendant to pay \$15,000 in cash to plaintiff for her attorney fees, the trial court's decision not to award plaintiff her unpaid attorney fees was not an abuse of discretion. *Borowsky, supra*. Similarly, we are not persuaded that an award of appellate attorney fees is justified based on need. MCR 3.206(C)(2)(a); *Gates, supra* at 439.

Affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra